

Background information regarding House Bills 5356-5358

Prepared by G. Ann Baker
Director, Corporation Division
Bureau of Commercial Services
Michigan Department of Labor & Economic Growth
for
Committee on New Economy and Quality of Life
November 29, 2007

Ban on corporate practice of medicine

Prior to the 1930s corporations marketed professional services under their own brand name. Courts reviewing these arrangements during the 1930s identified several potential hazards and pointed to licensure laws to hold that only licensed individuals, not corporations, can practice the learned professions.

As the practice of medicine developed, regulation to protect the health and safety of the public increased. Courts were concerned about lay interference in clinical practice and about the division of physician's loyalties. In People v Carroll 274 Mich 451, 264 NW 861, (1936), the court upheld the constitutionality of a statute requiring the owner or operator of a dental parlor to be a licensed dentist and held that the requirement did not deny due process of law to an unlicensed person who had an interest in a dental parlor.

The purpose of the ban on the corporate practice of medicine was to ensure patients would be treated by doctors and not by corporations. The argument is that corporations are likely to be more interested in corporate welfare than in patient welfare, but physicians and patients are more likely to focus on the patient. The policy protects physicians and patients by preventing a third party, the impersonal corporation, from making treatment decisions that both fail to take into account the individualized nature of medical treatment and run the risk of allowing some motive, such as profit, to intervene between patient and care.

Michigan follows the "learned profession doctrine" and traditionally the learned professions included medicine, law and divinity. While lesser trained personnel can master techniques, the central element of medicine as a learned profession is judgment. The ban on the corporate practice of medicine bars physicians from working for non-physicians because such arrangements could divide the physician's loyalty and permit laymen to substitute their own judgment for the physician's professional expertise. In addition, corporations are proscribed from hiring physicians as employees and profiting from the physician's work.

Adoption of Professional Service Corporation Act

The Professional Service Corporation Act, PA 192 of 1962, 450.221-450.235, created an exception to the "learned profession doctrine" and permitted for the first time the formation of a profit corporation to provide services in a "learned profession". The act permitted learned professions and professions prohibited by statute from incorporating to

use the corporate form. Organizing as a professional service corporation provided the ability to obtain federal income tax benefits, without the loss of the traditional obligations and responsibilities owed to their patients or clients.

Business Corporation Act

The purpose of the Business Corporation Act, 1972 PA 284, is set forth in section 103, MCL 450.1103, which provides the purpose of the act is:

- a) To simplify, clarify and modernize the law covering business corporations.
- b) To provide a general corporate form for the conduct or promotion of a lawful business or purpose with variations and modifications from the form as interested parties in any corporation may agree upon, subject only to overriding interests of this state and of third parties.
- c) To give special recognition to the legitimate needs of close corporations.

The Corporation Division of the Bureau of Commercial Services is the filing office for the formation of corporations and the filing of subsequent documents affecting the status of the corporation. The agency provides information to the public including Certificates of Good Standing and other certifications. The act governs the internal affairs of corporations and defines what documents are required and permitted to be filed with the agency. Corporation statutes impose provide not regulatory or enforcement authority for the filing office.

After passage of the Business Corporation Act there was confusion about whether incorporators had the option to choose to incorporate either under the Professional Service Corporation Act or under the Business Corporation Act. OAG No. 5676 (April 8, 1980) discussed the learned profession doctrine and concluded that a corporation could not be formed solely under the Business Corporation Act for the purpose of providing osteopathic services. The opinion described the four-point rationale of the learned profession doctrine:

1. Laymen should not be permitted, directly or indirectly by virtue of the corporate form, to practice medicine;
2. Necessary confidential and professional relationships existing between a physician and his patient could be destroyed by lay shareholders interested only in a profit;
3. The limited liability of the corporate form is not appropriate where the client must place such a high degree of trust and confidence in the physician; and
4. It is impossible for a corporation to fulfill the licensing and ethical requirements medical practice demands

In 1989, at the request of the Department, the Attorney General addressed the question of whether a corporation formed under solely the Business Corporation Act could engage in activities which may only be performed by one of the learned professions. Citing earlier Attorney General Opinions and authorities in other jurisdictions, the Attorney General concluded "that corporations formed under the Business Corporation Act may not engage in the practice of the learned professions." The opinion concluded that a corporation formed under the Business Corporation Act may not engage in activities that may only be performed by one of the learned professions. The opinion advised the Department to notify corporations formed under the Business Corporation Act and performing professional service activities and to give the corporations an opportunity to comply with the Professional Service Corporation Act. Notices were included with the 1990 and 2002 profit annual reports mailed to all active domestic and foreign profit corporations.

Section 13 of the Professional Service Corporation Act, MCL 450.233, provided that the Business Corporation Act applied to corporations organized under the professional service corporation act, except that if there is a conflict the professional service corporation act provision will control. OAG No. 6592 concluded that the Professional Service Corporation Act adopted the version of the Business Corporation Act that existed on July 18, 1980. To ensure that future changes to the Business Corporation Act were available to professional service corporations, section 123(1) of the Business Corporation Act was amended by PA 57 of 2001 to specifically provide that the act applies to corporations formed under the professional service corporation act. In addition, PA 58 of 2001, amended section 13 of the Professional Service Corporation Act. The enacting section of PA 58 declares the legislative intent for the reference to the Business Corporation Act in section 13 to include the latest amendments to the Business Corporation Act

Michigan Limited Liability Company Act

The Michigan Limited Liability, 1993 PA 23, as amended, is consistent with the Business Corporation Act and Professional Service Corporation and allows professions that are not within the learned profession to choose to form as a limited liability company under the general provisions of the act rather than Article 9. "Services in a learned profession" is defined in section 102(2)(s), MCL 450.4102(2)(s), "a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law".

The reference to certified public accountant was deleted from the definition of "services in a learned profession" by PA 336 of 2000, in conjunction with changes in the Occupational Code. The purpose of the changes was to make it clear that certified public accountants are not restricted to forming a professional service limited liability company and have the option of forming a limited liability company under the general provisions.

Bureau of Commercial Services Policies and Procedures

A corporation is a creature of statute and has the powers set forth in the statute under which it is formed.. The powers are subject to any limitation in the act under which it is formed, other statutes of the state, and its articles. Provisions in the articles cannot not

expand a corporation's authority beyond the authority granted by the act under which it is incorporated.

Business Corporation Act requires corporations to be formed for a lawful purpose and requires the agency to file a document if it substantially conforms to the requirements of the act. The Corporation Division may reject a document if the name or purpose implies the corporation will be providing services in a learned profession. In such a situation the customer is advised the corporation must organize under the Professional Service Corporation Act.

Remedies

The Business Corporation Act provides the State with draconian remedies if a corporation exceeds its authority. Sections 221, 271 and 821 of the act, MCL 450.1221, 450.1271(c), and 450.1821, provide broad authority to the Attorney General to bring an action against a corporation that is improperly formed, has exceeded its authority, or conducted its business in an unlawful manner. The ultimate penalty is dissolution of the corporation and loss of its limited liability protection.

Applicable licensing statutes and other state laws provide other remedies. Licensing statutes apply to a licensed person who has violated the licensing statute or rules and may apply to persons engaged in a licensed activity without complying with the license requirements. In addition, the penal code may impose criminal penalties for unlawful actions by licensed persons or for unlicensed activity.

Miller v Allstate

The court's determination in *Miller v Allstate* that PT Works, Inc. was improperly formed is unusual. Section 271(c) of the Business Corporation Act, MCL 450.1271(c), provides that the lack of capacity or power may be asserted "In an action or special proceeding by the attorney general to dissolve the corporation or to enjoin it from the transacting of unauthorized business. The act, however, provides no authority for a private party to challenge the validity of the formation of a corporation. .

The court's interpretation of the statutes is different than the interpretation followed for over 40 years by the Corporation Division and relied on by the public. The court held that businesses providing a personal service that requires a license could not organize under the Business Corporation Act. This interpretation requires many businesses to incorporate only as professional service corporations, limits flexibility in choice of entity, and will prohibit some businesses from organizing as corporations. Although businesses can choose to organize as a limited liability company for some businesses it may not be the preferred type of entity.

The *Miller* decision creates uncertainty for corporations formed under the previous interpretation. Those corporations may be considered to be operating illegally even though the Bureau of Commercial Services will issue a Certificate of Good Standing to the corporation and the Attorney General has taken no action against the corporation.

Existing corporations are concerned about an increase in litigation and expenses if third parties are permitted to challenge the validity of their incorporation.

They are also concerned about their ability to continue to conduct business if they are required to reorganize as a professional service corporation. Many of these corporations are ineligible to organize as professional service corporations. Although they might be able to reorganize as a limited liability company it is not practical and may have significant tax consequences.

It is unclear and uncertain what impact the *Miller* decision might have on malpractice litigation involving state licensed professions or the statute of limitations on malpractice claims against certified public accountants, architects, engineers and land surveyors.

Multistate corporations providing professional services wishing to expand to Michigan, cannot obtain a Certificate of Authority. A foreign profit corporation may only obtain a Certificate of Authority to transact in Michigan a business which a Michigan corporation formed under the Business Corporation Act may conduct. Without a Certificate of Authority a foreign corporation is prohibited from transacting business in the state. The status of the such foreign corporation currently providing professional services in Michigan is uncertain.

Publicly traded companies providing services of licensed professions may have to include in offering circulars and filings with the SEC information regarding the potential risks of continuing to operate in Michigan.

Agency response to new interpretation

The Corporation Division reviewed the statutory provisions for the various licensed activities listed on State License Search <http://www.michigan.gov/statelicenserearch> and in consultation with the Attorney General's office determined it was appropriate to narrowly apply *Miller*. MCL 450.222(c) contains three categories of professional services:

- 1) health professions licensed under Article 15 of the Public Health Code
- 2) occupations referred to as "professions" in their licensing statutes
- 3) occupations for which the licensees are held to standards of professional conduct.

On July 23, 2007, the Bureau of Commercial Services took the position that they would only require licensed occupations within these three categories to incorporate as professional service corporations. All other occupations would be permitted to continue to form under the Business Corporation Act or the Professional Service Corporation Act.

The court's interpretation requires the following professions to incorporate as professional service corporations instead of under the Business Corporation Act, although not required by their licensing statutes to do so.

- Architects
- Athletic trainers
- Audiologist
- Certified Public Accountants
- Chiropodists
- Chiropractors
- Counselors
- Dental assistants
- Dental hygienists
- Dieticians
- Funeral directors and morticians
- Land surveyors
- Marriage counselors
- Nursing home administrators
- Nutritionists
- Optometrists
- Physical Therapists
- Pharmacists
- Professional engineers
- Real estate brokers and salespersons
- Real estate appraisers
- Respiratory therapists
- Social workers
- Substance abuse counselors
- Veterinarians
- Veterinary technicians

The Corporation Division worked closely with the Corporate Laws subcommittee of the Business Law Section of the State Bar on amendments to address the issues raised by *Miller*. The goal is to clarify that only corporations formed to provide services in a learned profession are required to organize under the Professional Service Corporation Act.

Pre Miller

1. AG Opinion No. 6592 followed and "learned professions" required to form under PSCA if incorporate.
2. No private right of action in BCA to challenge whether corporation exceeded its authority. Only AG could challenge.
3. All professions, other than medicine and law, permitted to choose to form under BCA or PSCA.
4. Professions had flexibility to choose to organize as corporations, corporations, LLCs, PCs and PLLCS, as they preferred, and consistent with licensing statutes.
5. Foreign corporations and publicly traded corporations had ability to do business in Michigan to offer services, other than services in a "learned profession".
6. Consistent body of law regarding who and when authority or power of a corporation can be challenged.
7. Licensing statutes regulated professions.
8. Penal code addressed fraud, fee splitting false representation, and other crimes and violators could be prosecuted.
9. Attorney General could bring action if corporation exceeded its authority or operated in an unlawful manner.

After Miller

1. All licensed professions required required to organized under PSCA.
2. Third party permitted to challenge whether corporation is lawfully formed.
3. Option to organize under BCA not available if provide licensed service, without regard to "learned profession doctrine" or licensing act.
4. Professions limited in type of entity they may use, even when not limited in licensing statutes. Difficulty with succession planning for family businesses.
5. Foreign corporations and publicly traded corporation cannot do business in Michigan if offer licensed services.
6. Uncertainty regarding corporation's status, when status can be challenged, and whether creditors can avoid payment or hold shareholders personally liable.
7. Licensing statutes regulate professions
8. Penal code addresses fraud, fee splitting false representation, and other crimes and violators can be prosecuted.
9. Attorney General can bring action if corporation exceeds its authority or operates in an unlawful manner.

In *Miller v Allstate*, decided May 31, 2007, the Michigan Court of Appeals held that if a corporation can be formed under the Professional Service Corporation Act, it may not form under the Business Corporation Act. The court interpreted "professional service" in section 2(c) of the Professional Service Corporation Act, MCL 450.222(c), as a nonexclusive list and concluded that a corporation must form as a professional service corporation if it is providing a personal service to the public that requires a license.

PART 1-Services required to form under the PC Act

The professions listed in section 2(c) of the Professional Service Corporation Act are licensed under Article 15 of the Public Health Code, the Occupational Code, or by State Bar of Michigan.

Section 16105(2) of the Public Health Code, MCL 450.16105(2), defines "health profession" as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued under this article".

Section 721 of the Occupational Code, MCL 339.721, provides for adoption of rules to establish "rules of professional conduct" for certified public accountants and section 2005 of the Occupational Code, MCL 339.2005, requires professional experience for architects, surveyors, and engineers and refers to these occupations as professions.

Sections 939 and 940 of the Revised Judicature Act, MCL 600.939 and 600.940, have minimum education requirement, graduation from law school and passage of bar exam for admission to practice law. The Michigan Supreme Court adopts rules of professional conduct for lawyers.

Applying *Miller*, other occupations or vocations which are similar to those listed in section 2(c) of the Professional Service Corporation Act are 1) health professions licensed under Article 15 of the Public Health Code; 2) occupations licensed under the Occupational Code which are referred to as professions, providing professional services, or for which rules of professional conduct are established; and 3) occupations licensed under other statutes which are referred to as professions, providing professional services, or for which rules of professional conduct are established.

Corporations providing services within these categories are required to form under the Professional Service Corporation Act.

1. Professions listed in the definition of "professional service" in section 2(c)

Certified or other public accountants
Chiropractors
Dentists
Optometrists
Veterinarians
Osteopaths
Physicians and surgeons
Doctors of medicine
Doctors of dentistry
Podiatrists

Chiropodists
Architects
Professional engineers
Land surveyors
Attorneys at law

2. Additional professions licensed under Article 15 of the Public Health Code

Professions:

Athletic Trainer	Part 179, MCL 333.17901-17907
Audiologist	Part 168, MCL 333.16801-16811
Counselor	Part 181, MCL 333.18101-18117
Dental Assistant	see Part 166, MCL 333.16601-16648
Dental Hygienist	see Part 166, MCL 333.16601-16648
Dietician	Part 183a, MCL 333.18351-18363
Marriage Counselor	Part 169, MCL 333.16901-16915
Nurse	Part 172, MCL 333.17201-17242
Nursing Home Administrator	Part 173, MCL 333.17301-333.17319
Nutritionist	Part 183a, MCL 333.18351-18363
Pharmacist	Part 177, MCL 333.17701-17780
Physician's Assistant	see MCL 333.17008, 333.17048, 333.17548
Physical Therapist	Part 178, MCL 333.17801-17831
Psychologist	Part 182, MCL 333.18201-18237
Respiratory Therapist	Part 187, MCL 333.18701-18713
Social Worker	Part 185, MCL 333.18501-18518
Substance Abuse Counselor	Part 181, MCL 333.18101-18117
Veterinary Technician	see MCL 333.18805

3. Within a licensed profession

Acupuncture, practice of medicine, registered for title protection only, MCL 333.16215 and MCL 333.16511
Midwife, see nurse, MCL 333.17211
Solicitor, when context indicates "solicitor" means an attorney the requirement would be the same as for attorney at law.

4. Statute refers to as profession, professional or rendering professional services

Funeral Director	Article 18, MCL 339.1801
Mortician	Article 18, MCL 339.1801
Real Estate Appraiser	Article 26, MCL 339.2601-2637
Real Estate Brokers and salespersons	Article 25, MCL 339.2501-2518

PART 2-Services not required to form under the PC Act

The following are examples of occupations, vocations, or trades that are either not a "professional service"; there is no license requirement; or the entity, facility or agency is licensed, not the individual. For these activities, the policies and procedures remain the same as prior to the Miller decision.

Alarm Service	See MCL 338.1052
Auctioneers	title protection, See MCL 339.2905
Auto Body Repair/Detailing	See Motor Vehicle Service and Repair Act
Auto Mechanic	See MCL 257.1305
Bail Bondsperson	See MCL 500.410a
Barber	Article 11, Occupational Code
Blacksmith	See MCL 691.1992 and Horse Racing Law of 1995
Pilot	See Aeronautics Code of State of Michigan
Builder	Article 24, Occupational Code
Bus Service	See MCL 257.312f and 257.319g
Cable Installation	See MCL 338.887
Carpenter	trade, see Builder
Catering	See MCL 289.4101
Charter Boat Services	See 324.44502
Chauffer	See MCL 257.301
Collection Agent	Article 9, Occupational Code
Community Planner	title protection, see MCL 339.2303
Contractor	See Builder
Cosmetologist	Article 12, Occupational Code
Day Care	See MCL 772.115
Debt Management	See MCL 451.414
Detective	See MCL 338.823
Driver Education Provider	See MCL 256.629
Electrician	See MCL 338.883
Electrologist	Article 12, Occupational Code
Employment Agencies	See MCL 339.1001-1022
Esthetician	Article 12, Occupational Code
Fishing Charter Services	See MCL 324.44501-324.44526
Forester	title protection, see MCL 339.2108
Groom (Stable Attendant)	See MCL 431.316
Hearing Aid Dealer	Article 13 Occupational Code
Heating and Cooling	See MCL 338.971-338.988
Helicopter Charter Service	See Aeronautics Code of State of Michigan
Insurance Agent	See Chapter 12, Insurance Code of 1956
Insurance Counselor	See Chapter 12, Insurance Code of 1956
Interpreter (for the deaf)	See MCL 393.598b
Investment Advisor	See MCL 451.801
Landscape Architect	title protection, MCL 339. 2221
Limousine Service	See MCL 257.1903
Manicurist	Article 12, Occupational Code

July 23, 2007

Mason	See builder
Mortgage Broker	See MCL 445.1651
Occupational Therapist	title protection, MCL 333.18303
Ocularist	Article 27, Occupational Code
Pest Control	See MCL 324.8313
Plumber	See MCL 338.3525
Polygraph examiner	See MCL 338.1703
Residential Builder	Article 24, Occupational Code
Sanitarian	title protection, MCL 333.18411
Securities Broker/Dealer	See Uniform Securities Act, MCL 451.801
Securities Finder	See Uniform Securities Act, MCL 451.801
Solicitor	May be licensed under various acts to solicit on behalf of various businesses or organizations.
Water Well Contractor	See MCL 333.17204

Not every business requires a license. To find out if a state license is required, go to <http://www.michigan.gov/statelicensesearch/0,1607,7-180---,00.html>

PART 3-LLC Act unaffected

The policies and procedures for limited liability companies and professional limited liability companies remain the same as prior to the Miller decision.

[\[Previous Page \]](#) [\[Home Page \]](#)

The following opinion is presented on-line for informational use only and does not replace the official version. (Mich
Dept of Attorney General Web Site - www.ag.state.mi.us)

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6592

July 10, 1989

BUSINESS CORPORATION ACT:

Incorporation to provide learned professional services

COMMERCE, DEPARTMENT OF:

Acceptance of incorporation to provide learned professional services under Business Corporation Act

PROFESSIONAL SERVICE CORPORATIONS:

Application of limited liability and indemnification provisions of Business Corporation Act

Provision of more than one professional service

A domestic corporation formed under the Business Corporation Act may not engage in activities which may only be performed by one of the learned professions.

The Department of Commerce should not have accepted filings under the Business Corporation Act submitted by corporations performing professional service activities which are considered as one of the learned professions, or which must be performed by other professions which are prohibited by statute from incorporating other than under the Professional Service Corporation Act. These corporations should be notified and given an opportunity to comply with the terms, provisions and requirements of the Professional Service Corporation Act within a reasonable time.

A corporation incorporated under the Professional Service Corporation Act to provide one or more professional services may render such services, provided each shareholder of such professional service corporation (other than the personal representative of a deceased or legally incompetent shareholder) is fully qualified to perform all of the professional services rendered by the corporation.

Sections 209, 541, 561-565, and 569 of the Business Corporation Act, which provide for the limitation on the liability of and provide for the indemnification of directors, officers, employees, and agents of business corporations, do not apply to professional service corporations.

Mr. Doug Ross

Director

Department of Commerce

Law Building

Lansing, MI 48913

You have requested my opinion on four questions relating to professional service corporations. Your questions will be separately stated and answered.

Your first question may be stated as:

May a domestic corporation formed under the Business Corporation Act, 1972 PA 284, MCL 450.1101 et seq; MSA 21.200(101) et seq, engage in activities which may only be performed by one of the learned professions if the rendering of the professional service is not the sole purpose of the corporation?

Section 251(1) of the Business Corporation Act, MCL 450.1251(1); MSA 21.200(251)(1), provides in pertinent part:

"A corporation may be formed under this act for any lawful business purpose, except to engage in a business for which a corporation may be formed under any other statute of this state unless that statute permits formation under this act."

The Professional Service Corporation Act, 1962 PA 192, MCL 450.221 et seq; MSA 21.315(1) et seq, permits persons practicing professions to incorporate as professional corporations. Until this legislative enactment, the practice of professions generally recognized as the "learned professions" was not a lawful corporate purpose under Sec. 251(1) of the Business Corporation Act, supra. The "learned professions" have been generally recognized as law, medicine and divinity. See *Commonwealth v Fitler*, 147 Pa 288; 23 A 568, 569 (1892), *Georgia State Bd of Examiners in Optometry v Friedmans' Jewelers, Inc*, 183 Ga 669; 189 SE 238, 241 (1936), *Commonwealth v Brown*, 302 Mass 523; 20 NE2d 478, 481 (1939), *Silver v Lansburgh & Bro*, 72 US App DC 77; 111 F2d 518, 519 (1940), and *Lee Optical Co of Alabama, Inc v State Bd of Optometry*, 288 Ala 338; 261 So2d 17, 24 (1972).

Section 2(a) of the Professional Service Corporation Act, MCL 450.222(a); MSA 21.315(2)(a), defines a professional service as "any type of personal service to the public which requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization." This section then lists a number of the professional services specifically intended to come within this definition. However, the section, by its express terms, is not limited to the enumerated professions.

Section 2(b) of the Professional Service Corporation Act, MCL 450.222(b); MSA 21.315(2)(b), defines a professional corporation as

"a corporation which is organized under this act for the sole and specific purpose of rendering 1 or more professional services and which has as its shareholders only individuals who themselves are duly licensed or otherwise legally authorized within this state to render the same professional services as the corporation, or the personal representatives or estates of individuals as provided in section 10."

Sections 4, 5 and 8 of the Professional Service Corporation Act relate to the organization and functioning of the professional service corporation. Section 4 permits the formation of a professional service corporation for the purpose of rendering one or more professional services. Section 5 limits the rendering of services by the professional corporation to those officers, employees and agents licensed or otherwise legally authorized to render the services. Section 8 limits the issuance of stock only to persons who are licensed to render the same professional service as is provided by the corporation.

OAG, 1975-1976, No 4899, p 181, 182-183 (October 23, 1975), considered the term "profession" and its meaning within the terms of Const 1963, art 5, Sec. 5:

"The word 'profession' is most commonly employed in the sense of vocation, business, calling, or occupation, 72 CJS, Profession, pp 1215-1216, and usually connotes an attainment of special knowledge, as distinguished from mere skill. It also requires application of such education or special knowledge for others as distinguished from its pursuit for one's own purposes. The term further implies a practical dealing with affairs as distinguished

from mere study or investigation.

"Originally, and historically, the word 'profession' was applied only to law, medicine, and theology and these were known as the three 'learned professions.' Thus, in *United States v. Laws*, 163 US 258; 16 SCt 998; 41 LEd 151 (1896), the United States Supreme Court defined profession as:

"... an 'employment, especially an employment requiring a learned education, as those of divinity, law and physic.' (Worcester's Dictionary, title profession.) In the Century Dictionary the definition of the word 'profession' is given, among others, as 'A vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, their interests or welfare in the practice of an art founded on it. Formerly, theology, law, and medicine were specifically known as the professions; but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill....' "

"In modern usage, therefore, the tendency has been to enlarge and extend the scope and meaning of the term, and this has resulted in the word becoming more elastic and its denotation more liberalized, so that it has ceased to be applied exclusively to the learned professions. Thus, as science, learning and technology are extended to other areas of knowledge, additional vocations are so designated. 72 CJS, Profession, pp 1217-1219." (Emphasis by the Court.)

OAG, 1979-1980, No 5676, p 700, 701 (April 8, 1980), considered the "learned professions doctrine," its rationale and application to domestic corporations in the context of a question relating to the practice of osteopathic medicine. The opinion stated:

"Traditionally, learned professions have not been permitted to practice as corporate entities by virtue of what is sometimes referred to as the 'learned profession doctrine.' A four-point rationale has been generally advanced as the basis for this doctrine:

"1) Laymen should not be permitted, directly or indirectly by virtue of the corporate form, to practice medicine;

"2) Necessary confidential and professional relationships existing between a physician and his patient could be destroyed by lay shareholders interested only in a profit;

"3) The limited liability of the corporate form is not appropriate where the client must place such a high degree of trust and confidence in the physician; and

"4) It is impossible for a corporation to fulfill the licensing and ethical requirements medical practice demands. 47 Journal of Urban Law 674, 685-686 (1969)

"It was an analysis of this doctrine, together with a survey of the doctrine's application in sister states, which led to the conclusion in II OAG, 1955-1956, No. 2451, p 124 (March 7, 1956), that neither the practice of medicine nor the furnishing of osteopathic medical services was a lawful corporate purpose permitting formation of a corporation pursuant to business corporation statutes then in effect. The opinion held that it is not a lawful purpose of a corporation to contract with other persons to provide medical care through the officers, agents or employees of the corporation. See also *United States v. American Medical Association*, 72 US App DC 12; 110 F2d 703 (1940); cert den, 310 US 644; 60 SCt 1096; 84 LEd 1411 (1940); *People by Kerner v United Medical Services*, 362 Ill 442; 200 NE 157 (1936); 61 Am Jur 2d, Physicians, Surgeons and Other Healers, Sec. 15, 135.

"Since that opinion, the legislature has enacted the Professional Service Corporations Act, supra. The provisions of this Act address each of the four points of the rationale which underlies the learned profession doctrine prohibiting use of the corporate form by such professions."

The Corporation and Securities Bureau advises that it has considered attorneys, physicians, osteopaths, ophthalmologists, and psychiatrists to be professions covered by the learned professions doctrine. These professions have been permitted to incorporate only under the provisions of the Professional Service Corporation Act. It further

advises that certified public accountants, because of the provisions of Sec. 705 of 1980 PA 299, MCL 339.705; MSA 18.425(705), dentists, because of the provisions of 1978 PA 368, Sec. 1, MCL 333.16601; MSA 14.15(16601), and psychologists, based upon the informal advice of my office, have been permitted to incorporate only under the provisions of the Professional Service Corporation Act. All remaining professional services may incorporate under either the Business Corporation Act or the Professional Service Corporation Act.

Based upon the historical prohibition against the incorporation of the "learned professions," the legislative intent in enacting the Professional Service Corporation Act, which addresses and satisfies each of the traditional reasons against such incorporation, and the previously cited requirements of incorporating under the Professional Service Corporation Act, it must be concluded that corporations formed under the Business Corporation Act may not engage in the practice of the learned professions.

It is my opinion, in answer to your first question, that a corporation formed under the Business Corporation Act may not engage in activities that may only be performed by one of the learned professions.

Your second question is:

If the answer to the first question is in the negative, may existing corporations formed under the Business Corporation Act continue to provide professional services in one of the learned professions?

Section 3 of the Professional Service Corporation Act, MCL 450.223; MSA 21.315(3), provides:

"This act shall not apply to any corporation organized within this state prior to the passage of this act to perform professional services to the public. Any such corporation may bring itself within the provisions of this act by amending the articles of incorporation in such a manner so as to be consistent with all the provisions of this act and by affirmatively stating in the amended articles of incorporation that the shareholders have elected to bring the corporation within the provisions of this act."

Although the Professional Service Corporation Act was passed by the Legislature in 1962, it did not become effective until March 28, 1963. Section 3 permits corporations formed under the provisions of the Business Corporation Act prior to March 28, 1963, and performing professional services to retain their corporate authority as provided by the Business Corporation Act. This section also gives such corporations if lawfully formed before March 28, 1963, the opportunity to come within the terms of the Professional Service Corporation Act by amending their articles so as to be consistent with the requirements of the Professional Service Corporation Act. This change of corporate authority requires shareholder approval.

However, prior to March 28, 1963, professions considered to be one of the "learned professions" or professions prohibited by statute from incorporating were precluded from incorporating under the Business Corporation Act, since the services provided by the "learned professions" were not considered to be a legitimate corporate purpose. Once the Professional Service Corporation Act was enacted, all of these professional services previously excluded from incorporation were able to incorporate but only under the terms and conditions as set forth in the Professional Service Corporation Act.

It is significant that Sec. 4 of the Professional Service Corporation Act, as originally enacted, permitted incorporation of professional corporations under the provisions of both the Professional Service Corporation Act and the Business Corporation Act. However, some confusion apparently arose as to the proper statute to be used for incorporating professional service corporations. This issue was discussed in OAG, 1979-1980, No 5676, supra at 701, which concluded that the Legislature intended that a professional service corporation must be organized under the Professional Service Corporation Act and, in addition, may be organized under the Business Corporation Act, but not solely under the Business Corporation Act. 1980 PA 216 amended Sec. 4 of the Professional Service Act to delete all reference to the Business Corporation Act from this section. Left intact, however, was Sec. 13 of the Professional Service Corporation Act, which does recognize that the Business Corporation Act provisions apply to a professional service corporation where not inconsistent with the Professional Service Corporation Act.

The Corporation and Securities Bureau further advises that it has accepted filings from corporations formed under the Business Corporation Act, which are performing, as one of its corporate activities, professional services which may

only be performed by one of the learned professions.

It is my opinion, in answer to your second question, that the filings submitted by corporations formed under the Business Corporation Act and performing professional service activities which are considered as one of the learned professions, or which must be performed by other professions which are prohibited by statute from incorporating other than under the Professional Service Corporation Act should not have been accepted by the Department of Commerce. These corporations should be notified and given an opportunity to comply with the terms, provisions and requirements of the Professional Service Corporation Act within a reasonable period of time.

The third question is:

May a professional corporation be formed to render more than one service? If answered in the affirmative, may the professional service corporation have as its shareholders individuals who are licensed or authorized to perform less than all of the services to be rendered by the corporation?

Section 2(b) of the Professional Service Corporation Act, defines a "professional corporation" as meaning

"a corporation which is organized under this act for the sole and specific purpose of rendering 1 or more professional services and which has as its shareholders only individuals who themselves are duly licensed or otherwise legally authorized within this state to render the same professional services as the corporation, or the personal representatives or estates of individuals as provided in section 10."

Section 4 of the Professional Service Corporation Act provides:

"An individual or group of individuals licensed or otherwise legally authorized to render professional services within this state may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under this act for the purpose of rendering 1 or more professional services."

These sections were amended by 1980 PA 216 by inserting the words "1 or more professional services" for the words "professional service" and "professional service or services" in Secs. 2b and 4, respectively. This act was passed in response to OAG, 1979-1980, No 5497, p 203 (June 25, 1979), which concluded that a professional service corporation could not become a partner in a partnership. 1980 PA 216 also amended Sec. 7 of the Professional Service Corporation Act to permit professional service corporations to become an incorporator or shareholder in other professional corporations if both corporations performed the same professional service. 1980 PA 216 was enacted as 1980 HB 5380. The House Legislative Analysis, HB 5380 (H-1), April 1, 1980, stated in pertinent part:

"The bill would clarify certain other provisions in the act. A professional corporation would specifically be allowed to perform more than one professional service. Professional corporations could be incorporated only under the provisions of the Professional Service Corporation Act, and no longer also under the provisions of the Business Corporation Act, as is currently allowed."

"The bill would clarify the provisions of the Professional Corporation Act in light of recent attorney general interpretations of the statute, by removing reference to incorporation of a professional corporation under the Business Corporation Act. Since incorporation of professional corporations is provided for under the Professional Service Corporation Act, reference to the Business Corporation Act is not needed, and in fact is confusing. The bill would clarify the definition of a professional corporation to provide that such a corporation could provide more than one professional service; an authorization which is implicit in other provisions of the current professional corporations statute."

The manifest legislative intent is that a professional service corporation may incorporate under the Professional Service Corporation Act for the purpose of rendering more than one professional service.

Section 5 of the Professional Service Corporation Act provides:

"No corporation organized and incorporated under this act may render professional services except through its officers, employees and agents who are duly licensed or otherwise legally authorized to render such professional

services within this state. This provision shall not be interpreted to include in the term employee, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required."

In addition, Sec. 8 of the Professional Service Corporation Act provides in pertinent part:

"No corporation organized under the provisions of this act may issue any of its capital stock to anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated."

Furthermore, Sec. 10 of the Professional Service Corporation Act prohibits shares of a professional service corporation from being sold or transferred to anyone other than those individuals who are eligible to be shareholders. The only exceptions are transfers to a personal representative or estate of a deceased or legally incompetent shareholder of the professional service corporation, but only for a reasonable time and with the stipulation that such person shall not participate in any decision concerning the rendering of professional services.

Moreover, it is significant that when the Legislature amended Sec. 2(b) and Sec. 4 of the Professional Service Corporation Act by means of 1980 PA 216, no change was made to Sec. 8 of the Act.

It is my opinion, in answer to your third question, that a corporation incorporated under the Professional Service Corporation Act may render one or more professional services, provided that each shareholder (other than the personal representative of a deceased or legally incompetent shareholder) of the professional service corporation is fully qualified to perform all of the professional services rendered by the corporation.

Your final question asks:

Do the provisions of 1987 PA 1 apply to professional service corporations?

1987 PA 1 amended Secs. 209, 541, 561, 562, 563, 564, 565 and 569 of the Business Corporation Act. The amendments in general involve limitations on the liability of and provide for the indemnification of directors, officers, employees and agents of business corporations.

For example, Sec. 209 of the Business Corporation Act provides:

"The articles of incorporation may contain any provision not inconsistent with any of the following:

"(a) A provision of this act or another statute of this state, for management of the business and conduct of the affairs of the corporation, or creating, defining, limiting, or regulating the powers of the corporation, its directors and shareholders, or a class of shareholders.

"(b) A provision that under this act is required or permitted to be set forth in the bylaws.

"(c) A provision providing that a director is not personally liable to the corporation or its shareholders for monetary damages for a breach of the director's fiduciary duty. However, the provision does not eliminate or limit the liability of a director for any of the following:

(i) A breach of the director's duty of loyalty to the corporation or its shareholders.

(ii) Acts or omissions not in good faith or that involve intentional misconduct or knowing violation of law.

(iii) A violation of section 551(1).

(iv) A transaction from which the director derived an improper personal benefit.

(v) An act or omission occurring before March 1, 1987."

However, Sec. 6 of the Professional Service Corporation Act provides:

"Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct. Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services."

Although there is an apparent conflict between these two sections, it is unnecessary to address this issue until a determination is made on whether the provisions of 1987 PA 1 apply to professional service corporations.

Section 13 of the Professional Service Corporation Act, as amended by 1980 PA 216, provides in pertinent part:

"Act No. 284 of the Public Acts of 1972, as amended, being sections 450.1101 to 450.2099 of the Michigan Compiled Laws [Business Corporation Act], shall be applicable to a corporation organized pursuant to this act except to the extent that any of the provisions of this act are interpreted to be in conflict with the provisions of that act. In the event of conflict the provisions and sections of this act shall take precedence with respect to a corporation organized pursuant to the provisions of this act."

The answer to your question thus depends on whether amendments to the Business Corporation Act subsequent to its adoption in Sec. 13 of the Professional Service Corporation Act are incorporated in the latter statute.

In *Public Schools of the City of Battle Creek v. Kennedy*, 245 Mich 585, 591-592; 223 NW 359 (1929), the Supreme Court quoted with approval from *Culver v People*, 161 Ill 89; 43 NE 812, 814 (1896):

"The general rule is, that an act, which adopts by reference the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted, unless it does so by express or strongly implied intent. ... This rule seems to be strictly adhered to, where the prior act is particularly referred to in the adopting statute by its title. ... Where, however, the adopting statute makes no reference to any particular act by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken, or proceedings are resorted to."

Section 13 of the Professional Service Corporation Act adopted by reference the whole of the Business Corporation Act, except to the extent that there may be conflicts between the two acts, in which case the former is controlling. There is no indication that the Legislature intended that subsequent additions to or modifications of the Business Corporation Act would be included in the Professional Service Corporation Act.

Moreover, Sec. 13 of the Professional Service Corporation Act does not refer to the general law regulating corporations, but rather, refers specifically to the Business Corporation Act by public act number and citation. It can thus be concluded that the Professional Service Corporation Act adopted the Business Corporation Act as it existed on July 18, 1980, the effective date of the last amendment to Sec. 13 of the Professional Service Corporation Act making specific reference to the Business Corporation Act.

It is my opinion, therefore, that the provisions of Secs. 209, 541, 561, 562, 563, 564, 565 and 569 of the Business Corporation Act, as amended by 1987 PA 1, do not apply to professional service corporations.

Frank J. Kelley

Attorney General

[\[Previous Page \]](#) [\[Home Page \]](#)

<http://opinion/datafiles/1980s/op06592.htm>

State of Michigan, Department of Attorney General

Last Updated 03/23/2001 11:41:00